85-1540

Case No.

Supreme Court, U.S.
FILED
MAR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF

THE UNITED STATES

Term: October 1985

John Christopher Pracht,

Petitioner,

vs.

United States of America

On Petition for Writ of Certiorari
from the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the District Court erred in failing to grant the petitioner's motion for a new trial due to the government's failure to disclose evidence material to the defense, and whether the appellant is entitled to a judgment of acquittal or a new trial due to the government's failure to disclose evidence material to the defense?

a. Whether the District Court erred in denying the petitioner's motion to require the government to produce for an in camera inspection by the Court evidence in the possession of the government which the appellant believes to be material to the defense and to hold a hearing on this issue?

PARTIES TO PROCEEDING

1) The caption contains the names of all parties to the proceeding in this case in the United States Court of

Appeals for the Eleventh Circuit.

2) Caption of indictment in this case:

United States of America,

vs.

John Christopher Pracht,

Thomas Jackson Syfan,

William Edward Foster,

Jack Frederick Hoback and

Hershel B. Worthy,

Defendants.

2) Arthur Byron(A.B.) Murphy was indicted separately. Reginald Lee (Reggie) Gibson plead guilty to an information in this case.

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JURISDICTION

1. The judgment rendered by the United States Court of Appeals for the Eleventh Circuit sought to be reviewed in this matter was rendered on November 6, 1985 and entered on November 6, 1985.

2. The order of the United States Court of Appeals denying the petitioner's petition for rehearing and *en banc* consideration was rendered on December 16, 1985. By order of this Court rendered by Justice Lewis F. Powell, Jr. and dated February 10, 1986 the time for filing a petition for writ of certioari in this case was extended to and including March 17, 1986.

3. Section 28 *United States Code* 1254 (1) confers jurisdiction on this Court to review a judgment of a United States Circuit Court of Appeals in a criminal matter by writ of certioari.

CONSTITUTIONAL PROVISION INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Fifth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

The petitioner was the youngest person ever elected to the South Carolina Legislature. He served for eight years in the legislature, was a

real estate broker and auctioneer and, on occasion sold airplanes.(T., V.II, p. 2-71 - 2-72, 2-77, 2-161; T.Sen.14,24) His wife is the youngest daughter of former United States Congressman William Jennings Bryan Dorn.(T.Sen.p.29) He was a respected public servant. (T.,V.II,p. 65, 2-77, 2-161, 2-176, T.Sen., p.14,16, 18-20, 31-32)

Prior to the events which resulted in the indictment, the petitioner was sought out by an individual named A.D. (Andy) Griffith. Griffith, who was living in the State of Florida, contacted the petitioner through two different sources, initially in order to be introduced to the petitioner. After ultimately contacting the petitioner, Griffith requested that petitioner assist Griffith with a problem with the Federal Land Bank of South Carolina, which held a mortgage on the Griffith ranch in Florida. The problem with the Federal Land Bank was

ultimately resolved for Griffith and Griffith then employed the petitioner sometime in 1981 to sell certain properties, including the ranch in Florida. (Doc.97, pp.171-172, T.,V.II,p.2-73, 2-75, 2-77 - 2-78, 2-102 - 2-103, 2-143, 2-162, T.Sen. p.22.)

During their relationship, Mr. Griffith came to have a great deal of influence over the petitioner, as is illustrated by the testimony of Mrs. Marlene McClain at the sentencing hearing:

BY MR. McALILEY:

Q. Please tell the Court your name, your education, and your background, if you would, and where you live.
A. My name is Marlene McClain. I live at 606 Sherry Drive in Anderson. My background, I have an educational degree in Psychology. And Chris has been a very, very close personal friend to my husband and myself for the last 10 years.
Q. What is your husband's occupation?
A. He is a family court judge in the Tenth Judicial Circuit in South Carolina.
Q. Would you tell the Court, if you would, Mr. Pracht's reputation and

and standing in the community prior to his indictment for a serious crime?
A. I would have to say that one word that would describe that would be "excellent". He was so very highly thought of by everyone and respected by those who did not always agree with Chris. You had to respect him. He was so well thought of and always caring and concerned and very conscientious.
Q. Would you tell the Court, even before the indictment, were there rumors and street talk about Chris' probable indictment?
A. Yes, sir. For, I would say, a period of a year to 18 months.
Q. And it was common talk that that possibility might exist?
A. Yes.
Q. If I can, I will ask you this: Have you ever met Mr. A.D. Griffith?
A. Yes, I have.
Q. And under what circumstances?
A. I met him when he was living or staying in a bus beside Chris' and Debbie's house in the summer of 1982.
Q. Did you have an opportunity to talk to Mr. Griffith?
A. Yes, I did.
Q. Would you please tell the court very briefly your impression of Mr. Griffith and the type of personality that he was or is?
A. I was very weary (sic) of Mr. Griffith. To me he appeared from the first time I met him, to be a very manipulative person, very--I would say, and use the word sociopathic, a classic case of a con-artist-type person who would make grand promises and grand hopes and hold them out to Chris and pretend that he was his friend and was just looking out for Chris' best interests and his welfare and filled his head, I believe,

with all sorts of things that Chris at that time in his life maybe would not hear from other people, and had not gotten some support that he should have gotten. He just fell into what Mr. Griffith was trying to say.
Q. I'm not trying to excuse Mr. Pracht at all when I ask you this question, but would Mr. Griffith brag about his power and his connections and his influence?
A. Quite often.
Q. Did you ever warn Chris about Mr. Griffith?
A. Both my husband and I did.
Q. And you felt strongly enough about him and what you saw with Chris that you actually warned him about him?
A. Yes. Even if Chris had been able to sell Mr. Griffith's ranch and make a commission on that, I just didn't feel like he was a trustworthy person and I just do not feel like he should get tied in and get associated with someone like that.(T.Sen.p.20,L.4-p.22,L.16.)(emphasis added)

Prior to his association with Griffith petitioner had never before conceived of or thought of engaging in a drug smuggling venture.(See page 6 of petitioner's affidavit supporting bond motion filed in the Court of Appeals on Oct. 1, 1985.) It can be inferred from the record that at some point during their association petitioner was informed by Griffith that Griffith was an

experienced drug smuggler and that Griffith explained the mechanics and "code" of drug smuggling to the petitioner, as well as the profits to be gained from drug smuggling and invited the petitioner to engage in such a venture with Griffith, which never materialized. It can also be inferred from the record that Griffith then proferred to the petitioner that he would guide and direct the petitioner and his friends in a drug smuggling venture and would contact his drug smuggling associates with whom the petitioner was not acquainted to make arrangements for someone to broker the venture and that Griffith would invest in the venture. These inferences can be drawn from the testimony of co-defendants Gibson, Foster and Hoback, and from the opening statement of Mrs. Atkinson, Assistant United States Attorney. Gibson and Foster testified that they had known the

appellant most of his life and that they were childhood friends. (T.,V.II,p.7,2-142,2-143,2-161) Gibson testified that neither he nor the petitioner nor Foster had ever been involved in a drug smuggling venture before and that the three of them, who were friends, "pretty much" decided to engage in the venture on a "lark" without knowing how to do so except from "movies" and that the venture was a trial-and-error endeavor.(T.,V.II, p.2-163.) Foster testified that he had never been involved in a drug smuggling venture before, but that he was told that "Mr. Griffith had been doing that sort of thing before, and he was supposed to know how to do it" (T.,V.II,p.2-80.)

Mr. Hoback was to be the broker of the venture at the suggestion and request of Griffith. Hoback had an ongoing relationship in the drug smuggling business with Griffith and Mr. Worthy. Hoback testified that Worthy

had in the past negotiated with Griffith for the use of the Griffith ranch for smuggling ventures and had made sure that the ranch was "secure". Hoback said he did not remember how many such loads Worthy had helped him with. (T.,V.I,p. 58.) Hoback testified that he first heard the petitioner's name from Griffith and that there came a time when Griffith called Hoback and asked him to do something for the petitioner. (T.,V.I,p.60.) The implication is that Griffith asked Hoback to broker the venture.

In further support of the inferences to be drawn regarding Griffith's role, Mrs. Atkinson stated in her opening statement that Mr. Foster was "given approximately $10,000.00 by Mr. Chris Pracht so that he could get an extra 500 pounds for A.D. Griffith"(T.,V.I,p.18) The source of the $10,000.00 was never elicited in the testimony or otherwise

proven.

At the time the petitioner was employed by Mr. Griffith, his close friend Foster, who was in the utilities construction business had been experiencing financial difficulties and had been discussing these problems with the petitioner since 1980.(T.,V.II,p.2-78,2-79, 2-107,2-111.) Foster testified that during one of these conversations in 1982, he told petitioner that one of their contracts in Tennessee was going badly and that his company was in trouble.(T.,V.II,p.7-8) Petitioner told Foster that he had been working with a man named Griffith who might be able to help Foster "possibly in the drug business". Foster had not met Griffith.(T., V.II,p.9) In late 1981 or early 1982, Mr. Foster did meet Griffith.(T.,V.II, p.9-10) During or about December of 1981, petitioner and Griffith had just

returned from selling an airplane in Memphis, Tennessee, and it was at that time that Foster first met Griffith at the petitioner's home.(T.,V.II,p.2-102.) It was then that the formulation of an idea of a proposed drug venture began to evolve.(T.,V.II,p.2-103) The petitioner told Foster that Griffith wanted to talk to him personally to discuss his willingness to participate, and it was at that time that Griffith impressed Foster with his knowledge of smuggling and explained the "code of honor" of smuggling.(T.,V. II,p.2-114 - 2-118.) Foster made the decision to enter into a drug transaction because he needed the money.(T., V.II,p.10, 2-116.) At that time, the petitioner and Foster were to help Griffith with one of his "transactions", which never evolved.(T.,V.II,p.11.)

It can be inferred that some time thereafter Griffith contacted Hoback to ask him to broker the proposed venture.

Hoback testified that he first heard the petitioner's name when Griffith called him at a time Hoback did not recall, and Hoback's testimony strongly implies that Griffith requested that Hoback perform such a service for the appellant, which Hoback declined to do.(T.,V.I,p.60-61.) It can also be inferred from Hoback's testimony that the petitioner thereafter telephoned Hoback, at the instruction of Griffith, to make the same request. Hoback testified:

BY MS. ATKINSON:
Q. Did you ever speak to an individual known as Chris Pracht?
A. Yes, I did.
Q. Personally or over the phone?
A. Over the phone.
(Tr. of T.,V.I,p.61,L.4-8.)
Q. How did you get a hold of this individual?
A. He called me.
Q. Did he identify himself?
A. Yes, he did.
Q. How did he identify himself?
A. As Chris Pracht.
Q. Did he say anything about A.D. Griffith?
A. Yes, he did.
Q. What did he say?
A. He wanted to know if we were going to be able to put anything together or not.

Q. What did you tell him?
A. I told him no.(T.,V.I,p.61,L.15 - p.62, L.3.)(emphasis added)

Foster testified that in the early summer of 1982, he and the petitioner traveled to Spartanburg, South Carolina, where they met with Mick Fincher, whom the petitioner had known since he was in college, and discussed the possibility of Fincher purchasing a load of marijuana. Foster testified that after the meeting he and the petitioner discussed whether Fincher was capable of purchasing a load of marijuana. The petitioner told Foster that Fincher represented a group of people who had been in the distribution business for a number of years and that they were capable of doing what they said they could do.(T.,V. II,p.11-p.16.)

During the planning phase of the venture Foster ran into Griffith several times at the petitioner's home, and Foster and the petitioner traveled to

Charlton(sic), Georgia "once or twice" where the petitioner met with Griffith while Foster sat in another room.(T., V.II,p.2-118.)

In June or July of 1982 Foster and the petitioner flew to Atlanta, to meet with a man Griffith said would help the petitioner and Foster get an airplane and a supplier for the marijuana. They were to meet Worthy and possibly Hoback. They met Worthy, and the petitioner talked to Worthy and then told Foster that Worthy had agreed to present a proposal to his "boss".(T.,V.II,p.16-p.19.)

Two or three weeks later, petitioner and Foster returned to Atlanta to meet with Worthy who told the petitioner that "Napoleon" (Hoback) was not willing to arrange for the marijuana. Worthy agreed to ask Hoback if he would be willing to supply a pilot and an airplane if the petitioner and Foster were able to

provide their own marijuana.(T.,V.II,p. 19 -p.20.)

Foster testified that he and petitioner traveled to Spartanburg, South Carolina, again to meet with Fincher and told Fincher about the most recent conversation with Worthy in Atlanta. Foster stated that the petitioner later asked Fincher if the people he represented had a supplier of marijuana, and Fincher said they did not.(T.,V.II,p.20-p.21.) Foster testified that petitioner then decided to fly down to the Bahamas but was not comfortable with what he found.(T.,V.II,p.21-p.22.)

In the Fall of 1982, Reginald Lee Gibson, a childhood friend of the petitioner and Foster was at the home of the petitioner watching a video tape the petitioner had made to promote the sale of the Griffith Ranch, and Gibson commented in "passing" that the ranch with its airstrip in South Florida looked like

"a smuggling kind of thing". A few weeks later the petitioner and Foster asked Gibson if he would like to be a part of a drug smuggling venture, and Gibson said yes.(T.,V.II,p.2-142 - 2-144; p. 2-163; p.2-177.) However, petitioner, Gibson and Foster all began to have second thoughts about the venture, but Foster's financial difficulties propelled them onward at least in part and perhaps totally. Gibson testified:

CROSS-EXAMINATION BY MR. COBB:

Q. And as you talked about this venture, it was just sort of a joint discussion, wasn't it; the people would offer different ideas about how they could do this and how you should do that and what did you do in a smuggling venture. Isn't that pretty much the way the discussions went?
A. Yes.
Q. And Eddie participated in those conversations, did he not?
A. Yes.
Q. And there was some point in time, and I'm not sure what time, and maybe you can help us with that, Mr. Gibson, Mr. Pracht said, "Listen, this is all crazy. We don't know what we're doing. We ain't got the faintest idea how to do something like that. Let's just forget about it."
A. Well, we all wanted to quit. I know

I did. I know Chris did. I mean, you know, we just--we didn't know what we were going into. We just went and just said, "This is crazy." Yes.
Q. And during that period of time that you all were discussing quitting this foolish venture, Eddie kept saying that he needed some money, isn't that right?
Q. There were times when that occurred, yes.
Q. In terms of actual need, in terms of financing, as far as you know, Chris was obviously working and he was in the Legislature and he was living at home and he wasn't going bankrupt, was he?
A. Not that I know of.
Q. And you realized that everyone, I guess at some point in their life could need or use more money than they had?
A. Yes.
Q. And you weren't in a position that you were in dire financial straits, were you?
A. No.
Q. Mr. Foster was really the only one who was unfortunately involved in a bad financial situation because of his business, isn't that correct?
A. Eddie's business was having problems, yes, sir.
Q. So Eddie was more of a motivating force because he needed the money more than anybody else.
A. Eddie needed the money.(T.,V.II,p. 2-165, L.1-p.2-166,L.16.)

In October or November of 1982, petitioner and Foster met Worthy in Atlanta. Worthy told them that if they could settle on and get the money Hoback could supply an airplane.(T.,V.II,p.24.)

Petitioner and Foster met with Fincher who with a Mr. Little was willing to commit up to $100,000.00.(T.,V.II,p.25-27.) In December of 1982, Gibson and petitioner went to Jamaica to search for a supplier.(T.,V.II,p.29.) They arrived at the airport and "were approached by a good many people" by the time they got to the hotel.(T.,V.II,p.2-145.) They didn't know a supplier, but the suppliers came up to them like vendors.(T., V.II,p.2-168.) They chose two of these people.(T.,V.II,p.2-145 - 2-146) They were going to buy 1,500 pounds of marijuana at Fifty($50.00) dollars per pound.(T.,V.II,2-147 - 2-148.) In January of 1983(T.,V.I,67,[illegible].) Hoback met with co-defendant Murphy. Co-defendants, Murphy and Syfan are pilots. Hoback told Murphy that he wanted Murphy to fly a trip.(T.,V.I,71-72,137-138,225.) Petitioner, Foster, Worthy and Murphy met in Atlanta.(T.,V.I,141-142.) Murphy told

petitioner and Foster that they would need to lease an airplane that would carry 3,000 pounds. Murphy said he had never seen a load go as planned as far as weight and indicated that the weight was usually less than planned because of loading and volume problems. (T.,V.I,145-147.) Foster and petitioner left, picked up $32,500.00 and drove back to Atlanta. (T.,V.II,p.36,L.19 - p.37, L.8.) Foster testified that the petitioner then called Griffith to get his approval to turn the money over to Murphy.

DIRECT EXAMINATION BY MS. ATKINSON:

Q. And what happened then?
A. At that point, Chris called, made a telephone call to Mr.- - he told me he was calling Andy Griffith. And as I recall the conversation, he told Mr. Griffith that, "I am giving them the money. Do you approve?" And obviously I would expect that he did because Chris did at that time release the money to them. And at that point, Mr. Murphy and Chris spread out a chart of the area in Jamaica and discussed the coordinates,

and the just the exact location of the strip.(T.,V.II,p.37,L.12-21.) (emphasis added)

They all left the meeting.(T.,V.I, p.148; V.II,p.37.) Murphy stole an airplane and delivered it to Syfan.(T., V.I,149-150.) Gibson and petitioner returned to Jamaica to make sure "everything was okay." (T.,V.II,2-148.)Foster delivered an additional $10,000.00 to Jamaica to pay the Jamaicans. Foster stated that petitioner negotiated for 2,000 pounds of marijuana and an additional potential 500 pounds.(T.,V.II, 38-40.) Murphy called petitioner and told petitioner that he had the airplane and was ready to go.(T.,V.I,p.150.) On or about January 13, 1985, Foster drove a brown Ford van to the Griffith ranch, and petitioner flew to the Griffith ranch. Petitioner and Foster rented a car in Vero Beach.(T.,V.II,p.40-42.) Murphy and Syfan arrived at the Griffith

ranch in the stolen airplane.(T.,V.I, p.150-152.)

Petitioner gave Foster $10,000.00 so he could get an extra 500 pounds for Griffith.(T.,V.I.p.18.) On or about January 14, 1983, Foster, Murphy and Syfan left for Jamaica.(T.,V.I,p.157.) Gibson was in Jamaica.(T.,V.II,p.2-150 - 2-151.) The plane landed in Jamaica and was loaded with bales.(T.,V.II,p.48-49.) On the return flight they developed mechanical problems, threw the bales out, landed the plane at the Fort Pierce airport and abandoned it.(T.,V.I,p.163-170.) Petitioner and Foster were reunited and returned to South Carolina on January 15, 1983.(T.,V.II,p.55-57.)

On April 17, 1984 petitioner was indicted and charged with conspiracy to import marijuana, importation of marijuana on January 14, 1983 and possession with intent to distribute more than

1,000 pounds of marijuana in violation of 21, U.S.C. 952(a), 21 U.S.C. 960(a)(1), 21 U.S.C. 963, 21 U.S.C. 952 and 18 U.S.C. 2. Title 18 United States Code 3231 confers original jurisdiction of all offenses against the laws of the United States on the United States District Court, the court of first instance in this case.

On April 24, 1984 the United States Magistrate for the Southern District of Florida issued her standing discovery order which stated in part:

> C. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of Brady v. Maryland, 1963, 373 U.S. 83, and United States v. Agurs, 1976, 427 U.S. 97.(Doc.21.)

On May 14, 1984 petitioner moved for disclosure of the existence of informers pursuant to Brady v. Maryland, 373 U.S.

83, 83 S.Ct. 1194, 10 L.Ed 215(1963) and Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623(1957). (Doc.41.) On May 23, 1984 the United States Magistrate for the Southern District of Florida granted petitioner's motion for disclosure of the existence of informers. The magistrate further ordered that where the government had independent knowledge or information resulting from investigations conducted by other governmental agencies, whether state or federal, which was pertinent and material to the defense of the petitioner's case or favorable to the petitioner, it should be promptly disclosed to the petitioner.(Doc.45.) The government did not disclose the existence of any informer or informers.

Prior to trial petitioner received discovery material implicating Griffith in numerous drug smuggling activities

and other criminal activities.(Doc.97, 172.) In his opening statement Worthy's counsel told the jury there were "two big guys" in this venture, Griffith and Hoback, and expressed wonderment at the failure to indict Griffith.(T.,V.I,p.33.) On cross examination Hoback testified that in May 1983(4 months after the venture and 11 months before the indictment) a DEA agent in Memphis asked Hoback to call Mr. Miller, the FBI agent in charge of this case, because the DEA agent thought Hoback could help Miller.(T.,V.I, p.88,113,129.) Hoback further stated that he had been smuggling drugs but had not been charged with or convicted of a crime. On further cross examination Hoback stated that he called Miller, offered to help, met with Miller, truthfully told Miller about the venture and Murphy, testified before a grand jury in June 1983 about the venture, untruthfully

denied his involvement to the grand jury and was not indicted.(T.,V.I,pp.83,84, 86,87,88,90,129,130,131.) Murphy was indicted.(T.,V.I,p.176,198.) Murphy testified on cross examination that in February 1983 (one month after this venture) he was arrested on a smuggling venture in Mississippi and believed Hoback was the informer in that case. Murphy was convicted in the Mississippi case. (T.,V.I,p.196-197.) On August 29, 1983 Murphy was leaving jail on appeal bond when he was told that he had been indicted on this venture and requested a removal hearing.(T.,V.I,p.176,197-198.) A U.S. treasury agent visited Murphy and told him Hoback had delivered counterfeit money to the agent stating Murphy gave the money to Hoback. Murphy denied the allegation, passed a polygraph test, and the treasury agent didn't believe Hoback. On September 2, 1983 Miller and

a DEA agent, Mr. Griggs, whom Murphy believed to be associated with Hoback were at the removal hearing and attempted to talk to Murphy. Murphy refused to talk to Miller and Griggs.(T.,V.I, p.176-178, 197,198.) On October 13, 1983 Hoback was arrested on a state charge in Arkansas for selling a kilogram of cocaine.(T., V.I,p.87,101,102.) Murphy reviewed the discovery material against him and in October or November 1983 contacted Miller and told him he wanted to work out a plea.(T.,V.I,p.180.) Miller told Murphy the government wanted to make cases against Hoback, Syfan, the Petitioner, Foster and Murphy. Murphy testified before a grand jury on February 14, 1984 which resulted in the indictment in this case.(T.,V.I,202-203.) In March 1984 Hoback was sentenced to life on the state charge in Arkansas.(T.,V.I,p.87, 101,102) On April 17, 1984 the

indictment in this case was returned. (Doc. 1, p.1-6.) On cross examination Hoback testified that the "system in Arkansas" approached the Asst. U.S. Attorney in Florida about Hoback testifying in this case, and on August 10, 1984 Hoback entered a plea to a federal cocaine charge in Arkansas. Hoback explained that he did not want to be imprisoned in the Arkansas prison system, and one of his motivations was to serve his sentence in the federal prison system.(T.,V.I,p.75-76,104-107,112.)

Approximately one day into the trial petitioner was provided with records of the Okeechobee County deputies and the FBI which stated that the Griffith ranch was under surveillance from January 14-16, 1983. Registration information on the petitioner's Cessna and the brown van was obtained. Petitioner was followed and stopped when he left the ranch, and

the telephone records for a telephone at Quik Stop were subpoenaed for the time petitioner made a telephone call. The car rental contract was obtained. A detailed record was made of the location of vehicles and the airplane. The area was searched. On January 17, 1983 tire impressions on the airstrip were photographed and measured. The north area of the ranch was unsuccessfully searched for stash areas. On January 21, 1983 Miller asked for gasoline samples from four 55 gallon drums, three of which were inside the hangar and all of which were painted black and had printed on the sides "J.P. ONLY" and "JET A" and that they along with the van be processed for fingerprints except for one drum sitting outside the hangar. The van was also searched and sealed with evidence tape. (Doc. 97, 154-166;192-201.)

After trial appellant received a call from someone identifying himself only as a former FBI agent who said the government had failed to disclose exculpatory information.(Doc.97,p.166.) Counsel for appellant contacted Murphy and Syfan who said they had not told Hoback either the date of the venture or specific details of the venture.(Doc.115-116.) Appellant filed motions for a new trial, a hearing and production of government documents relating to Griffith and his agents and an in camera review of those documents due to suppression of evidence establishing a defense of entrapment and in support of the motions filed a portion of Hoback's 302's describing a party at the Griffith ranch with high ranking Colombian army officers involved in smuggling and police officers as guests and with local county deputies guarding the entrance to the ranch. On the same page

Hoback said Griffith had told him he had murdered a smuggler and buried him on the ranch.(Doc.97,p.202.) [1] The District Court denied all of petitioner's post trial motions.(Doc.125.)

Petitioner did not take the stand during trial and on October 16, 1984 a jury found petitioner guilty on all

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[1] Although it is not reflected in the record in this case, Griffith was indicted on February 2, 1986 in the United States District Court for the Southern District of Florida in a case captioned: United States of America v. Andrew David Griffith, John Dover, William Dillow and Rodrigo Pasada a/k/a Alex Dalton, (Case No. 86-8015-CR-Roettger) which charges Griffith in Count I with conspiracy to import marijuana and cocaine between August 1979 and May 1983; in Count II with importation of marijuana on August 10, 1981; in Count III with importation of cocaine on October 23, 1982; in Count IV with importation of marijuana on January 14, 1983; in Count V with importation of cocaine on February 21, 1983 and in Count VI with importation of cocaine on May 4, 1983. Griffith was not charged with a continuing criminal enterprise count, and counsel finds these charges amazingly minimal in light of the testimony in this case, and Hoback's 302's. Counsel believes that it is her duty to this Court in light of Counsel's argument to note Griffith's recent indictment.

three counts.(T.,V.IV,p.4-118.) Petitioner was sentenced on December 27, 1984 and remanded at sentencing.(Doc. 129.) Petitioner appealed(Doc.124.), and on June 23, 1985 petitioner's main brief was filed wherein petitioner argued that the police reports obtained during trial and the testimony elicited from Murphy and Hoback on cross examination inescapably established the existence of an informer. Petitioner argued that only Griffith could have provided the information utilized by the police officers and F.B.I. in their searches and surveillance and that only Griffith could have provided the information needed for Agent Miller to contact Hoback through the DEA agent. Petitioner contended that the government had suppressed evidence in violation of Brady v. Maryland, supra, and United States v. Agurs, 427 U.S. 97, 96 S.Ct.

2392, 49 L.Ed. 342(1976). On August 26, 1985 the government filed its brief. On page 17 of the Brief of the United States, counsel for the government stated:

> Such speculative allegations do not adequately invoke the rule, and there was no informant in this case. (emphasis added)

On November 6, 1985 the United States Court of Appeals for the Eleventh Circuit rendered its decision and found without discussion that petitioner's Brady claim was meritless. On November 26, 1985 petitioner filed his petition for rehearing and en banc consideration before the United States Court of Appeals for the Eleventh Circuit. On December 16, 1985 petitioner's petition for rehearing and en banc consideration was denied. On December 31, 1985 petitioner received documents he had requested from the Department of Justice on June 18, 1985 pursuant to 5 U.S.C. 552(The Freedom

of Information Act) which were dated December 17, 1985 and which had been forwarded to petitioner at the Atlanta Federal Prison Camp from the Federal Correctional Institution in Tallahassee, Florida. This material clearly establishes the existence of an informer in this case. Sections of the material have been exempted (blacked out) with the explanation that the material was exempted pursuant to 5 U.S.C. 552(b)(7)(D) which provides that information disclosing the identity of a confidential source or information provided by a confidential source may not be made available to the public. On March 13, 1986 counsel for the petitioner mailed to the United States Court of Appeals for the Eleventh Circuit for filing a motion to supplement the record to be transmitted to the United States Supreme Court on petition for writ of certiorari to include the

Freedom of Information Act material obtained by petitioner on December 31, 1985. The motion is based on Singleton v. Wulff, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976) and Dickerson v. Alabama, 667 F.2d 1364(11th Cir.1982) and was made in order to prevent further misrepresentation by the government.

ARGUMENT

The Court of Appeals found without discussion that the petitioner's claim of constitutional error due to suppression of material evidence by the government was without merit. Petitioner respectfully submits that the decision of the Court of Appeals and the facts and circumstances of this case present two reasons why this Court should review this case on writ of certioari. First, by dismissing this issue

as meritless without discussion the Court of Appeals has disregarded the holdings of this Court in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); United States v. Agurs, 427 U.S. 97, 96 S.Ct.2392(1976) and United States v. Bagley, _U.S._, 105 S.Ct. 3375(1985). Second, petitioner respectfully submits that this case exemplifies why this Court should establish both a clearly defined rule on disclosure of information favorable to the defense upon a specific request for that information from the prosecution and a clearly defined rule imposing strong sanctions against the prosecution when the prosecution deliberately commits a constitutional violational by suppressing the requested information.

A. The opinion of the Court of Appeals disregards Brady v. Maryland, supra; United States v. Agurs, supra, and United States v. Bagley, supra.

Petitioner moved prior to trial for disclosure of the existence of informers pursuant to Brady and Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623(1957). (Doc. 41), but was not informed that an informer existed. The United States Magistrate ordered months before trial that where the government had independent knowledge or information resulting from investigations conducted by other governmental agencies, whether state or federal, which was pertinent and material to the defense of the petitioner's case or favorable to the petitioner, it should be promptly disclosed.(Doc.45). Information elicited from Hoback and Murphy on cross examination and the police reports which were not provided until after the trial had started and which describe an intense surveillance, searches, issuance of subpoenas, processing for fingerprints and obtaining

evidence from the day of the venture until six days after the venture without a plausible explanation establish the existence of an informer. Only Griffith who directed the venture, provided the ranch and gasoline, invested $10,000.00 in the venture and who was not a co-defendant in the case could have provided the government with all the apparent information used in the investigation. It is impossible to believe that the intensive surveillance of the ranch between January 14-16, 1983 was routine. The issuance of subpoenas during this time for the telephone records of a call from a pay phone made by the petitioner some distance from the ranch after he was followed and observed making the call and then stopped for no apparent reason and for the rental car contract were certainly not routine surveillance procedures especially when the officers

never observed commission of a crime or conduct which could be characterized as suspicious. Mr. Miller of the F.B.I. had to have specific prior or almost simultaneous information in order to request, within six days of the venture that gasoline samples be taken from the specific 55-gallon drums used to fuel the airplane in the venture and that they with the brown van be processed for fingerprints and that the brown van be searched and sealed.(Doc.97.) Clearly, the police officers had prior knowledge of the venture and had the ranch under surveillance waiting for the airplane to return from the venture so that the participants could be arrested and the marijuana seized. Their efforts failed, however, when the airplane loaded with marijuana never returned and a search of the ranch on January 17, 1983 failed to reveal a "stash"(Doc.97.) The government

was faced with a dilemma, and four months later in May of 1983 a DEA agent in Memphis contacted Hoback. Hoback had smuggled more than twenty loads of drugs, had not been charged with or convicted of a crime, had apparently on occasion worked as an informer, had maintained a long standing relationship with Griffith and had brokered the venture at the request of Griffith. At the request of the DEA agent Hoback contacted Miller, truthfully provided information to Miller about the venture, testified before a grand jury, denied his involvement, was not indicted but implicated Murphy who was indicted in August of 1983.(T.,V.I, p.58,60,61,79,83,84,86,87,88,90,113,129, 130 131,177,178,196,197.) In October or November of 1983 Murphy decided to enter a plea, and Murphy testified before a grand jury in February of 1983 resulting in the indictment in this case.(T.,V.I,p.

180,202,203, Doc.1.) The government argued in its brief before the Court of Appeals that the intense police activity at the ranch between January 14-16, 1983 resulted from observation of petitioner's single engine Cessna during an aerial surveillance of airstrips in the northern Okeechobee County area believed to be used in narcotics smuggling. (Brief of United States, p.18.) However, the police report states that as a result of informing the Florida Department of Law Enforcement of the registration number on the Cessna, the investigators received information that the aircraft "was involved with several smuggling investigations during 1982."(Doc.97, p.193.) It is not clear from this statement whether the aircraft was "involved with" the investigators or the smugglers. Moreover, petitioner had been flying airplanes with a student pilot's license up until approximately

July of 1982 when Griffith assisted the petitioner in obtaining his pilot's license and at approximately the same time Griffith ranch sold the airplane to the petitioner's real estate company, Piedmont Pine Corp.(See petitioner's affidavit in support of his motion for bond after remand filed in the Court of Appeals on October 1, 1985.)

The record documents that the petitioner was not pre-disposed to commit this crime but was sought out by Griffith and employed by Griffith who planted the idea of the venture and directed the petitioner's actions. Petitioner was deprived of material evidence necessary to develop and present a defense of entrapment, and petitioner was never provided with the F.B.I. reports obtained pursuant to the Freedom of Information Act on December 31, 1985 which state that portions of the material have been deleted to protect

the identity of and information provided by a confidential source or sources.

This Court held in Brady v. Maryland, supra, that suppression of evidence by the prosecution favorable to the accused and material either to guilt or punishment violates due process. In United States v. Agurs, supra, this Court found that when the prosecutor receives a specific and relevant request from the defense for material information or for information for which a substantial basis for claiming materiality exists, "the failure to make any response is seldom, if ever, excusable". United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399(1976). In United States v. Bagley, _U.S._, 105 S.Ct. 3375(1985) this Court found the materiality test stated in Strickland v. Washington, _U.S._,104 S.Ct. 2052, 80 L. Ed.2d 674(1984) sufficient to cover all situations of failure to disclose evidence

and stated the definition of material evidence:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding, would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. United States v. Bagley, 105 S.Ct. at 3384.

This Court stated that determinations of materiality may be made on the degree of specificity of the defense requests and how the defendant's preparation for trial and presentation at trial were affected by the specificity of the request and the prosecution's response or lack of response. This Court noted that the more specific the defense request the more likely the defense is to assume from nondisclosure that the evidence does not exist and to make pretrial and trial decisions on that basis. The reviewing court may consider "any adverse effect" failure to respond to a defense request had on

preparation or presentation of a defendant's case. Bagley, at 3384.

The focus of this inquiry should not be on the evidence supporting the verdict but should instead be on whether if the evidence disclosed during cross examination and in the police reports obtained during trial had been disclosed at a sufficient time prior to trial and developed by reasonably competent counsel, there is a reasonable probability the result would have been different. Only the petitioner and Worthy went to trial, and neither petitioner nor Worthy testified. Both were convicted. The defense consisted mainly of cross examination and argument designed to show that both men were no more culpable than Foster who had been allowed to plead to the importation count in exchange for his testimony and attacking the government's case as to the sufficiency of the evidence pertaining to

the weight of the marijuana. Griffith was a prominent but absent figure at the trial. Even had the government only disclosed the police reports obtained during trial sufficiently prior to trial and fully disclosed Hoback's status and situation as elicited on cross examination, as well as, the circumstances surrounding his debriefing defense counsel would have known, even though the government had not responded to the request to disclose the existence of informers, that an informer existed who was either Griffith or one of his agents. Defense counsel would have conducted a further investigation and made additional pre-trial discovery motions on the basis of this information seeking disclosure of the identity of the informer and would have subpoenaed Griffith, Miller, DEA Agent Griggs and the county deputies involved in the search and

surveillance. Hoback would have been further cross examined about his relationship with the government and Griffith. Griggs would have been questioned about his association with Hoback. Miller would have been examined about how he knew within six days of the venture which gasoline drums were used and about the brown van. The county deputies would have been examined about the reasons and source of information resulting in their intense surveillance and search of January 14-16, 1983, and Griffith would have been questioned about his association with the government which allowed him to entertain Colombian army officers involved in smuggling with police protection, his relationship with the petitioner and his involvement in the venture. Petitioner would have taken the stand to testify about his relationship with Griffith, and other witnesses would have been

presented by the defense to corroborate Griffith's relationship with and influence over the petitioner. Perhaps Foster would not have pled guilty. The record establishes that had it not been for Griffith these crimes perhaps would not have been committed, and certainly, the petitioner, Foster and Gibson would not have been participants and now imprisoned.

As it was, in the midst of trial counsel for petitioner not only did not have time to fully investigate this information but did not comprehend the full significance of this information. Prior to trial counsel rightfully believed that to subpoena Griffith would serve no purpose and perhaps be harmful to the defense. Counsel did not understand why Griffith had not been indicted but without sufficient reason to believe otherwise, thought that to put Griffith on the stand would only result in his

invoking the protection of the Fifth Amendment to the United States Constitution. Furthermore, in the absence of a fully developed defense, to attempt to hold Griffith responsible for petitioner's actions would have been fruitless and might have angered both the jury and the Court.

> (A)n inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense. When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision. Bagley, at 3390.(Dicta.)(Marshall, J. and Brennan, J. dissenting.)

Petitioner was deprived of material evidence necessary to develop and present a defense of entrapment. A defense not only affects the verdict but may also affect the sentence. Since this case presents a meritorious Brady issue which the Court of Appeals has dismissed as

meritless, counsel concludes that the Court of Appeals rejected Brady v. Maryland, supra; United States v. Agurs, supra; and United States v. Bagley, supra, and the decision of the Court of Appeals directly conflicts with these decisions of this Court.

B. This case exemplifies why this Court should establish both a clearly defined rule on disclosure of information favorable to the defense upon a specific request and a clearly defined rule imposing strong sanctions against the prosecution when the prosecution deliberately commits a constitutional violation by suppressing the requested information.

In this case it is apparent that the undisclosed information would have had an impact on the defense presented at trial and perhaps on the judgment. The prosecution's duty is not to convict,

but to see that truth emerges so far as possible. Bagley, at 3389.(Brennan, J. and Marshall, J. dissenting citing Giles v. Maryland, 386 U.S. 66, 98(1967) (Fortas J. concurring.)) The government tries a defendant, and only the government has the resources available to insure that the trial is fair. The defense is handicapped from the beginning. Defense counsel has only those fruits of the prosecution's investigation available to him which the prosecution voluntarily discloses to the defense based on the prosecution's determination that disclosure is appropriate. When defense counsel makes a specific request for disclosure of material information from the prosecution, defense counsel must rely on the prosecution's good faith. If the prosecution deliberately suppresses that information, then defense counsel may believe that the information does not exist, or

if defense counsel still suspects that the information exists, the defense may have no other avenue of obtaining the information and may have to abandon pursuit of the information. In the instant case, since the trial, counsel has acquired information which seems to indicate the nature of Griffith's employment by or association with the government, and the government's motivation for suppressing this information. However, the information regarding Griffith's employment by the government cannot be presented in testimony at a post conviction proceeding because it was obtained from an individual who would invoke the protection of the Fifth Amendment to the United States Constitution, to avoid inculpating himself in Griffith's criminal activities and from a lawyer who acquired the information through a privileged communication and

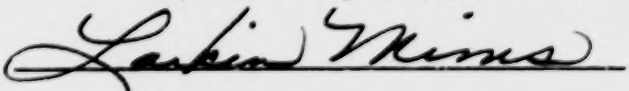
cannot testify to it. The information regarding the government's motivation for suppression in and of itself is not sufficient to reasonably expect relief from a tribunal, and the individual who provided that information might also successfully assert that the information was acquired through privileged communications. Counsel mentions this only to show that the defense may never be able to acquire and present evidence deliberately suppressed by the government.

There must be some assurance for the accused that his trial will not be unfair because dispositive evidence was suppressed by the prosecution with the result that he is convicted or denied the opportunity to develop an available defense. Defendants are frequently financially and emotionally depleted by the trial and appeals process. Even

if the defendant prevails in the end, the battle may have waged for years, and he may still have endured imprisonment, public humiliation, separation from his family and depletion of his finances. Society will suffer as much as the defendant because society looks to the prosecution not only for an advocate to prosecute those who would victimize society but also as a bastion of justice which preserves and protects our society by seeking truth and justice for the accused. By comparison, the prosecution which suppressed the evidence will suffer very little, if at all, in the end. If the misconduct of the prosecution is egregious in light of the particular situation, then the conviction should be vacated with prejudice against the prosecution or some similar severe sanction imposed. In cases in which the governmental misconduct is

less severe, a reversal and new trial would be in order. The defense should never be forced to use the trial as an inadequate discovery tool to acquire suppressed evidence. Such prosecutional misconduct is a blatant and deliberate violation of the defendant's constitutional right to due process. In the instant case the prosecution deliberately suppressed evidence which had been specifically requested by the defense. Had this evidence been disclosed to the defense prior to trial and developed by defense counsel there is a reasonable probability the result of the trial would have been different.

Respectfully submitted,



Larkin Mims

Attorney for the Petitioner,

John Christopher Pracht

210 North Main Street

Anderson, South Carolina 29621

(803)224-5006

17th day of March, 1986.

APPENDIX

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

- - - - - - - - - - - - - - -

No. 85-5007

Non-Argument Calendar

- - - - - - - - - - - - - - -

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN CHRISTOPHER PRACHT,

Defendant-Appellant.

- - - - - - - - - - - - - - -

Appeal from the United States District Court for the Southern District of Florida

- - - - - - - - - - - - - - -

(November 6, 1985)

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

Appellant, John Christopher Pracht, and five others, were indicted for

conspiracy to import marijuana (count I), importing more than 1,000 pounds of marijuana (count II), and possessing more than 1,000 pounds of marijuana with intent to distribute (count III). Four of the defendants decided to coooperate with the Government during the week prior to trial and pled guilty. Thereafter, appellant and the remaining codefendant went to trial. With the aid of the cooperating codefendants, the prosecution presented an overwhelming case against appellant, and he was convicted on all counts. He now appeals, contending, among other things, that the trial court erred in refusing to grant him a continuance (after appellant learned that four of his accomplices had decided to cooperate with the Government and said he needed more time to prepare for trial), in denying his motion for severance, and in not allowing the jury to rehear certain testimony. The trial court's ruling

in each of these instances was committed to its sound discretion, and we find no abuse thereof.

Appellant's remaining claims of error are meritless. Finding nothing in this record warranting a reversal of any of appellant's convictions, they are, severally,

AFFIRMED.

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

OFFICE OF THE CLERK

50 SPRING STREET, S.W.

ATLANTA, GEORGIA 30303-3147

December 16, 1985

SPENCER D. MERCER, CLERK

In replying give number of case and names of parties

TO ALL PARTIES LISTED BELOW:

No. 85-5007 - USA V. PRACHT

This is to advise that an order has this day been entered denying the petition ( ) for rehearing.

__ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been

denied.

X No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the petition () for rehearing en banc has also been denied.

See rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

SPENCER D. MERCER, CLERK

By: s/ June Phillips

Deputy Clerk

Enc.

cc. Larkin Mims, Esq.
Karen L. Atkinson, AUSA-Miami
Nancy Worthington, AUSA-Miami
David Leiwant, AUSA-Miami
Linda Collins Hertz, AUSA-Miami

REHG-3

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 16 1985
SPENCER D. MERCER
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-5007

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN CHRISTOPHER PRACHT,

Defendant-Appellant.

- -

Appeal from the United States District Court for the Southern District of Florida

- -

ON PETITION FOR REHEARING AND SUGGESTION

FOR REHEARING EN BANC

(Opinion November 6, 11 Cir., 1985,

____F.2d____).

(December 16, 1985)

Before TJOFLAT, VANCE and KRAVITCH,

Circuit Judges

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure;

Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/

United States Circuit Judge

REHG-6

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

OFFICE OF THE CLERK

50 SPRING STREET, S.W.

ATLANTA, GEORGIA 30303-3147

December 24, 1985

SPENCER D. MERCER
Clerk

In replying give number of case and names of parties

Mr. Robert M. March, Clerk

U.S.D.C.

301 N. Miami Ave.

Miami, FL 33128-7788

No. 85-5007 - USA v. Pracht

(D.C. No. 84-8030-CR-LCN)

(X) Enclosed is a certified copy of the judgement of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 35 Decision in the above case as and for the mandate.

( ) The Court having denied the motion for stay of mandate, enclosed is a certi-

fied copy of the judgment of this Court in the above case issued as and for the mandate. See attached notice.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(x) Copy of the Court's opinion.

(X) Original record on appeal or review -- 9 vols. ROA; 1 vol. 1st sup ROA

( ) Original exhibits

( ) Bill of Costs approved by this Court.

Sincerely,

SPENCER D. MERCER,

CLERK

By: s/June Phillips

Deputy Clerk

Encl. --9 vols. ROA; 1 vol. 1st Supp. ROA

cc: Larkin Mims, Esq.
Karen L. Atkinson, AUSA-Miami
David Leiwant, AUSA-Miami
Nancy L. Worthington, AUSA-Miami
Linda Collins Hertz, AUSA-Miami
Leon B. Kellner, US Atty-Miami

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-5007

Non-Argument Calendar

D.C. Docket No. 84-8030

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN CHRISTOPHER PRACHT,

Defendant-Appellant.

- - - - - - - - - - - - - - - - - -

Appeal from the United States District Court for the Southern District of Florida

- - - - - - - - - - - - - - - - - -

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

JUDGMENT.

This case came on to be heard on the transcript of the record from the United

States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: November 6, 1985

For the Court: Spencer D. Mercer, Clerk

By: s/_____

Deputy Clerk

ISSUED AS MANDATE: DEC 24 1985

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-8030-CR-LCN

UNITED STATES OF AMERICA:		
Plaintiff,	:	STANDING
vs.	:	DISCOVERY
JOHN CHRISTOPHER PRACHT,	:	ORDER
WILLIAM EDWARD FOSTER	:	
HERSCHEL B. WORTHY	:	
Defendant(s).	:	
	:	

Re above-named defendant(s) having been arraigned this date in open Court, it is thereupon

ORDERED AND ADJUDGED that on or before fourteen (14) days from the date of this Order, the parties shall confer and the following shall be accomplished.

A. The government shall permit the defendant to inspect and copy the following items or copies thereof, or supply copies thereof, which are within

the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the government:

1. Written or recorded statements made by the defendant.

2. The substance of any oral statement made by the defendant before or after his arrest in response to interrogation by a then known-to-be government agent which the government intends to offer in evidence at trial.

3. Recorded grand jury testimony of the defendant relating to the offenses charged.

4. The defendant's arrest and conviction record.

5. Books, papers, documents, photographs, tangible objects, buildings or places which the government intends to use as evidence at trial to prove its case in chief, or were obtained from or

belonging to the defendant. 0 0 0 0 3 2

REC'D IN DOCKETING 5-1-84	DOCKETED 5-2	BY JL
21	TO STARS	COMPLETED BY STARS

6. Results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with this case.

B. The defendant shall permit the government to inspect and copy the following items, or copies thereof. of supply copies thereof, which are within the possession, custody or control of the defendant, the existence of which is known or by the exercise of due diligence may become known to the defendant.

1. Books, papers, documents, photographs or tangible objects which the defendant intends to introduce as evidence in chief at trial.

2. Any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case which the defendant intends to introduce as evidence in chief at trial, or which were prepared by a defense witness who will testify concerning the contents whereof.

3. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, or intends to introduce expert testimony relating to a mental disease, defect or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall give written notice thereof to the government.

C. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope

of Brady v. Maryland, 1963, 373 U.S. 83, and United States v. Agurs, 1976, 427 U.S. 97.

D. The government shall disclose to the defendant the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of United States v. Giglio, 1972, 405 U.S. 150, and Napue v. Illinois, 1959, 360 U.S. 264. 0 0 0 0 3 3

E. The government shall supply the defendant with a record of prior convictionsof any alleged informant who will testify for the government at trial.

F. The government shall state whether defendant was identified in any lineup, showup, photo spread or similar identification proceeding, and produce any pictures utilized or resulting therefrom.

G. The government shall advise its agents and officers involved in this

case to preserve all rough notes.

H. The government shall advise the defendant of its intention to introduce during its case in chief proof of evidence, pursuant to Rule 404(b), Federal Rules of Evidence.

I. The government shall state whether the defendant was an aggrieved person, as defined in Title 18 United States Code Section 2510(11), of any electronic surveillance, and if so, shall set forth in detail the circumstances thereof.

J. The government shall have transcribed the grand jury testimony of all witnesses who will testify for the government at the trial of this cause, preparatory to a timely motion for discovery.

K. The government shall, upon request, delivery to any chemist selected by the defense, who is presently registered with the Attorney General in compliance with 21 U.S.C. Section 822 and Section

823, and 21 C.F.R. Section 101.22(8), a sufficient representative sample of any alleged contraband which is the subject of this indictment, to allow independent chemical analysis of such sample.

L. The government shall permit the defendant, his counsel and any experts selected by the defense to inspect any automobile, vessel, or aircraft allegedly utilized in the commission of any offense charged. Government counsel shall, if necessary, assist defense counsel in arranging such inspection at a reasonable time and place, by advising the government authority having custody of the thing to be inspected that such inspection has been ordered by the Court.

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M. The government shall provide the defense, for independent expert examination, copies of all latent fingerprints or palm prints which have been identified by a government expert as those of

the defendant.

N. The parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth and existence of which is not contested and the early resolution of which will expedite the trial.

O. The parties shall collaborate in preparation of a written statement to be signed by counsel for each side, generally describing all discovery material exchanged, and setting forth all stipulations entered into at the conference. No stipulations made by defense counsel at the conference shall be used against the defendant unless the stipulations are reduced to writing and signed by the defendant and his counsel. This statement, including any stipulations signed by the defendant and his counsel, shall be filed with the Court within five (5) days following the conference.

It shall be the continuing duty of

counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of this Standing Order.

Upon a sufficient showing, the Court may at any time, upon motion properly filed, order that the discovery or inspection provided for by this Standing Order be denied, restricted or deferred, or make such other order as is appropriate. It is expected by the Court, however, that counsel for both sides shall make every good faith effort to comply with the letter and spirit of this Standing Order. 0 0 0 0 3 5

All motions concerning matters not covered by this Standing Order must be filed pursuant to Local Rule 10G within twenty-eight (28) days of this Order.

DONE AND ORDERED at West Palm Beach, Florida, this 24th day of April, 1984.

s/

UNITED STATES MAGISTRATE

PATRICIA JEAN KYLE

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 84-8030-CR-LCN

UNITED STATES OF AMERICA,

Plaintiff,

vs ORDER

JOHN CHRISTOPHER PRACHT,

Defendant.

_____/

Upon due consideration of the several motions of the defendant, John Christopher Pracht, filed herein, and said motions having been referred to the undersigned pursuant to Local Magistrate Rule 1(c), it is

ORDERED AND ADJUDGED

1. Motion for Early Disclosure of Jencks Act Material (docket #39) is DENIED. U.S. v. Algie, 667 F.2d 569 (6th Cir. 1982). Nevertheless, the Government shall consider whether in the interest of expediting the conduct of

the trial Jencks material shall be disclosed prior to the witness testifying. Further, any Brady material which also constitutes Jencks material shall be disclosed no later than 24 hours before trial.

2. Motion for Bill of Particulars (docket #43) is GRANTED.

3. Motion for Disclosure of Existence of Informers (docket #41) is GRANTED.

4. Motion for James Hearing (docket #42) is DEFERRED to the Trial Court for determination.

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	TO STARS	COMPLETED BY STARS 5-23

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MAY 23 1984

5. Motion to Disclose (docket # 40) is GRANTED. The Government shall provide disclosure within ten (10) days hereof.

6. Motion for Disclosure of Impeaching Information(docket #38) is GRANTED as to the following items:

"1" -- except that juvenile adjudications are not to be disclosed unless such individual is still on probation or parole therefrom; see Davis v. Alaska, 415 U.S. 308 (1974);

"2"; "3"; "4";

"6" -- exclusive of testimony before any Grand Jury and further limited solely to such occasions where the informant has been impeached;

"8";

"9" -- as it refers to items "1", "2", "3", "4", "6", and "7".

The motion is DENIED in all other respects.

As to item "7", the motion is DENIED, excepting, however, that to any personnel files for any witness, the Government shall be extremely sensitive and alert to any information regarding specific instances of misconduct by such witnesses which would be material to their credibility as witnesses and shall exercise diligence in investigating and disclosing such matters to the defendant when they are discovered -- whether from files maintained by any Governmental agency or otherwise.

Further, where the Government has independent knowledge of information resulting from investigations conducted by other

Governmental agencies, either State or Federal, which is pertinent and material to the defense of this case or favorable to the defendant, it shall promptly disclose such evidence to the defendant.

Any Brady material which also constitutes Jencks material shall be disclosed no later than 24 hours before the date of trial.

The Government shall further disclose any matter which may in any way impeach or discredit such witness. U.S. v. Deutsch, 475 F.2d 55(5th Cir. 1973); Calley v. Calloway, 519 F.2d 184, 222, 224 (5th Cir. 1975), cert. den., 425 U.S. 911; U.S. v. Gaston, 608 F.2d 607, 612, 613 (5th Cir. 1979).

Attention of Counsel is directed to Local Rule 10G. Failure to comply therewith may result in denial of motions.

DONE AND ORDERED at Miami, Florida, this 21 day of May, 1984.

s/ Herbert S. Shapiro

Herbert S. Shapiro

United States Magistrate

cc: Counsel of Record

0 0 0 0 8 0(cont'd)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-8030-CR-NESBITT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN CHRISTOPHER PRACHT,

Defendant.

_____/

ORDER

THE COURT has reviewed the various motions filed by the Defendant, JOHN CHRISTOPHER PRACHT, and after due consideration it is

ORDERED AND ADJUDGED that

1. The Motion for New Trial and Extension of Time to File Documentation and Memorandum in Support of this Motion filed on November 19, 1984 and the same is hereby DENIED.

2. The Notice of Motion and Motion for a New Trial Due to the Court's Denial of the Defendant's

Motion for a Continuance Dated October 5, 1984, filed on November 19, 1984, be and the same is hereby DENIED.

3. The Notice of Motion and Motion for Judgement of Acquittal or, in the Alternative, a New Trial on Counts II and III of the Indictment Due to the Insufficiency of the Evidence, filed on November 19, 1984, be and the same is hereby DENIED.

4. The Motion for Hearing and In Camera Review of Evidence the Government Failed to Disclose, filed on November 19, 1984, be and the same is hereby DENIED.

FILED by D.Q.
DEC 27 1984
Robert M. March
CLERK U.S. DIST CT
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5. The Notice of Motion and Motion for a New Trial Based Upon Failure of the United States Government to Disclose Evidence Material to the Defense, filed on November 19, 1984, be and the same is hereby DENIED.

6. The Notice of Motion and Motion for a New Trial Due to the Court's Denial of the Motion for Severance, filed on November 19, 1984, be and the same is hereby DENIED.

7. The Motion for Judgment of Acquittal or, in the Alternative, for a New Trial on Count III of the Indictment

Which Charges the Defendant with Possession of More Than 1,000 Pounds of Marijuana With Intent to Distribute, filed on November 19, 1984 be and the same is hereby DENIED.

DONE AND ORDERED in chambers at Miami, Dade County, Florida this 26 day of December, 1984.

s/Lenore Nesbitt

U.S. DISTRICT JUDGE

cc: Larkin Mims, Esq.
Thomas W. McAliley, Esq.
Karen Atkinson, AUSA

United States of America vs.

John Christopher Pracht

United States of America
District Court for Southern District of Florida
Docket No. 84-8030-CR-Nesbitt

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date--12-27-84

__ WITHOUT COUNSEL, However the Court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

__ WITH COUNSEL

Thomas McAliley, Esq.

COUNSEL (cont'd)	(Name of Counsel)
FINDINGS & JUDGMENT	There being a finding/verdict of __ NOT GUILTY. Defendant is discharged X GUILTY. Defendant has been convicted as charged of the offense(s) of Count 1: Conspiracy to import marijuana; Count 2: Importation of marijuana; Count 3: Possession with intent to distribute marijuana.
	The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary

SENTENCE

OR

PROBATION

ORDER

was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of
five (5) years as to Count 1.
IT IS ADJUDGED that as to count two, the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of five (5)years. Further, that he serve a special parole term of two years.
IT IS ADJUDGED that as to

SPECIAL CONDITIONS OF PROBATION	count three, the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of ten years. The sentences imposed in counts two and three are to run concurrent with each other and concurrent with sentence on count one. Total sentence, 10 years. Defendant remanded to custody of U.S. Marshall
ADDITIONAL CONDITIONS	In addition to the special conditions imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change

OF PROBATION	the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.
COMMITMENT RECOMMENDATION	The Court orders commitment to the custody of the Attorney General and recommends,

s/Lenore Nesbitt

Date 12-30-84

SIGNED BY

__ U.S. District Judge

__ U.S. Magistrate

It is ordered that the Clerk deliver

a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer

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	TO	COMPLETED BY
#129	1-8	1-8

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JAN 08 1985

Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1540

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN CHRISTOPHER PRACHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1540

JOHN CHRISTOPHER PRACHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government improperly withheld exculpatory material.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 952(a) and 963 (Count 1); importation of more than 1,000 pounds of marijuana, in violation of 21 U.S.C. 952 (Count 2); and possession of more than 1,000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a) (Count 3). He was sentenced to concurrent terms of five years' imprisonment on Count 1, five years' imprisonment and a two-year special parole term on Count 2, and 10 years' imprisonment on Count 3. The court of appeals affirmed (Pet. App. A2-A4).

The evidence at trial revealed that petitioner was one of the founders and prime participants in a scheme to smuggle large quantities of marijuana into Florida and South Carolina. Petitioner participated in this scheme with a drug dealer named A.D. Griffith, as well as with a number of other co-conspirators. 1 Tr. 60-61, 144-145, 154-155; 2 Tr. 9-12, 16-22, 22-33, 38-40, 143-144. Four of these co-conspirators ultimately agreed to cooperate with the government; with their aid, as the court of appeals put it, "the prosecution presented an overwhelming case against [petitioner]" (Pet. App. A3).

Prior to trial, petitioner had requested the disclosure, under *Brady* v. *Maryland*, 373 U.S. 83 (1963), of exculpatory materials in the possession of the prosecution, including materials relating to the possible use by the government of a confidential informant (Pet. 22-23). While the government provided certain discovery materials to petitioner (*id.* at 23), the prosecution explained that it had obtained no information from any informants in this case. After his conviction, petitioner moved for a new trial, stating his belief that Griffith had served as an informant and asserting that the government improperly had failed to disclose that fact. The government responded that petitioner had failed to establish the existence of an informant, and it assured both the district court and the court of appeals that there was in fact "no informant in this case" (Gov't C.A. Br. 17; see *id.* at 18). The district court denied petitioner's motion without opinion (Pet. App. A31-A34); the court of appeals affirmed in an unpublished order, finding petitioner's *Brady* contention "meritless" (*id.* at A4).

2. Petitioner's sole contention before this Court is a factual one: that the government made use of a confidential informant and improperly withheld his name from the defense (Pet. 34-54). This argument is entirely without merit, however, because petitioner has failed to point to any

reason to believe that such an informant in fact existed. While petitioner spends considerable time speculating that the government would not have begun its investigation without an informant (Pet. 37-40), that speculation is unsupported by anything in the record; to the contrary, the government explained to the satisfaction of the courts below that no informant existed and that no evidence was withheld from petitioner. The conclusion reached by both courts below on this factual question does not warrant further review.

Petitioner also states that, pursuant to the Freedom of Information Act, 5 U.S.C. 552, he has received a Federal Bureau of Investigation report concerning the investigation in this case. Because a portion of the report was withheld under 5 U.S.C. 552(b)(7)(D), which exempts from disclosure law enforcement records provided by a "confidential source," petitioner asserts that an undercover informant must have existed (Pet. 33, 41-42). Section 552(b)(7)(~~6~~)(D), however, reaches not only information provided by undercover operatives, but also data provided by other law enforcement agencies or by private citizens. See, *e.g.*, *Kimberlin* v. *Department of the Treasury*, 774 F.2d 204, 209 (7th Cir. 1985); *Johnson* v. *Department of Justice*, 739 F.2d 1514, 1518 (10th Cir. 1984). The FBI report on its face thus provides no support for petitioner's assertion, and it does not in any way undercut the government's consistent representation that no informant was used in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1986

Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 85-1540

IN THE SUPREME COURT OF

THE UNITED STATES

Term: October 1985

John Christopher Pracht,

Petitioner,

vs.

United States of America.

On Petition for Writ of Certiorari
from the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF OF PETITIONER TO MEMORANDUM IN OPPOSITION

Larkin Mims
210 North Main Street
Anderson, South Carolina 29621
Telephone Number: (803)224-5006
Attorney of record for the Petitioner,
John Christopher Pracht

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2. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342(1976),p.7,8.

3. United States v. Bagley, _U.S._, 105 S. Ct. 3375(1985), p.8.

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1. 5 U.S.C. 552 .....p.1,9

2. 5 U.S.C. 552(b)(7)(D)....p.1,9,10,13

3. 5 U.S.C. 552(b)(7)(F)....p.13

Table of other References

1. 59 ALR Fed. 554, Confidential Source, p.10.

2. Legislative History, Texts and Other Documents, p.10

ARGUMENT

Respondent recites the government's version of the facts of this case and argues that petitioner has presented a factual issue and that the Federal Bureau of Investigation reports obtained pursuant to the Freedom of Information Act, 5 U.S. C. 552, do not on their face provide support for petitioner's contention that the government suppressed the existence of an informer because 5 U.S.C. 552(b)(7)(D) exempts information provided by both undercover operatives and other law enforcement agencies or private citizens.

Respondent alleges in the governments version of the facts that the government has repeatedly denied the existence of an informer in this case to counsel for the petitioner, the district court and the court of appeals. Such is not the case. The sole denial by the government regarding the existence of an

informer was made in the government's brief submitted to the court of appeals at page 17.

Respondent states in the government's version of the facts:

> Prior to trial, petitioner had requested the disclosure, under Brady v. Maryland, 373 U.S. 83(1963), of exculpatory materials in the possession of the prosecution, inclu-ing materials relating to the possible use by the government of a confidential informant (Pet. 22-23). While the government provided certain discovery materials to petitioner (Pet. 23), the prosecution explained that it had obtained no information from any informants in this case. (Resp. Mem. in Opp. 2, typewritten copy) (emphasis added)

Counsel for petitioner, and petitioner have no personal knowledge of any

explanation or representation by the prosecution prior to or during trial that the prosecution had not obtained any information from informants in this case. The respondent further states:

> After his conviction, petitioner moved for a new trial, stating his belief that Griffith had served as an informant and asserting that the government improperly had failed to disclose that fact. The government responded that petitioner had failed to establish the existence of an informant, and it assured both the district court and the court of appeals that there was in fact "no informant in this case" (Gov't C.A. Br. 17; see id. at 18). (Resp. Mem. in Opp. 2, typewritten copy.) (emphasis added)

Counsel for petitioner along with Thomas W. McAliley, of Miami, Florida

drafted, filed and served petitioner's post trial motions, and counsel for petitioner has absolutely no knowledge of any response by the government, either written or oral, to petitioner's post trial motions and absolutely no knowledge whatsoever of the government assuring the district court that there was not an informant in this case. Respondent correctly states that the government represented to the court of appeals that there was no informant in this case (Gov't C.A. Br. 17), but counsel is informed and believes that the government has never made any representations either to defense counsel for the petitioner or to the district court regarding the existence or non-existence of an informer in this case. Respondent cites page 18 of the government's brief submitted to the Court of Appeals to support respondent's

allegation that in response to petitioner's post trial motions the government assured the district court that there was not an informer in this case. (Resp. Mem. in Opp. 2, typewritten copy) Respondent is referring to a sentence on page 18 of the government's court of appeals brief in which the government contended that the prosecution denied the existence of an informer in response to petitioner's pretrial motion requesting disclosure of the existence of informers and cited "(R-78-80)" in support of that contention. That sentence states:

> In addition, the government has consistently denied the existence of any informant, even in response to the district court's order to disclose informers (R 78-80). (Gov't C.A. Br. 18.)

The record of the district court

does not contain any denial of the government regarding the existence of an informer. The government did cite "R 78-80" as supporting this contention as noted by the respondent in its reference to page 18 of the government's court of appeals brief, but "R 78-80" is a reference to the district court's order requiring the government to disclose the existence of informers (Gov't C.A. Br. 3, n.2, key to abbreviations of references in Gov't's brief) and is not a reference to such a denial by the government.

Respondent inaccurately argues that petitioner's contention "is a factual one" that the government made use of a confidential informant and improperly withheld his name from the defense" (Resp. Mem. in Opp. 2, typewritten copy). Petitioner's argument is not factual but rather is based on the facts of this case as applied to the precedents

established by this Court and is in two parts. First, petitioner submits that if the evidence disclosed during cross examination and in the police reports obtained during trial had been disclosed at a sufficient time prior to trial in response to petitioner's pre-trial motions and the district court's orders and developed by reasonably competent counsel, there is a reasonable probability the result would have been different. Petitioner submits that the government's failure to disclose this information prior to trial deprived the petitioner of material evidence necessary to develop and present a defense of entrapment and that the court of appeals' decision dismissing this issue as meritless conflicts with Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215(1963); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342

(1976); and United States v. Bagley, _U.S._, 105 S.Ct. 3375(1985). (Pet. 42-49) Second, petitioner submits that this case exemplifies why this Court should establish a clearly defined rule imposing strong sanctions against the prosecution when the prosecution deliberately suppresses requested information. It is the facts of this case that establish that the evidence obtained during trial demonstrate that an informer did exist despite the fact that the government remained silent and did not disclose the existence of an informer in response to petitioner's pre-trial motion to disclose the existence of informers and the district court's orders that the government promptly disclose to the defense: the existence of informers; any information favorable to the defense pursuant to Brady v. Maryland, supra, and United States v. Agurs, supra, and

any information or knowledge resulting from investigations of governmental agencies, either state or federal, which was pertinent or material to the defense or favorable to the petitioner. (Rec. of D.C. Doc. 41; Pet. 22-23, 49-54, A-18, A-19, A-26, A-28, A-29).

It is the record in this case which documents that dispositive evidence was deliberately suppressed by the prosecution, and that is the factual basis of petitioner's argument.

Respondent also argues that the F.B.I. records obtained by the petitioner pursuant to the Freedom of Information Act, 5 U.S.C. 552, which contain large sections of exempted material with the explanation that the material was exempted pursuant to 5 U.S.C. 552(b)(7)(D) which provides for exemption of the identity of and information provided by a "confidential source" do not on their

face support petitioner's argument because 5 U.S.C. (b)(7)(D) exempts both information provided by undercover operatives and private citizens or other law enforcement agencies providing confidential information. According to the legislative history of the 1974 amendments to the Freedom of Information Act the substitution of the term "confidential source" in 5 U.S.C. 552(b)(7)(D) was to clarify that both paid informers and the information they provided and other persons and the information they provided would be exempted if the information was provided under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. 59 ALR Fed. 554, citing in n.1 Legislative History, Texts and Other Documents, p. 230. It is true that some courts have extended the exemption afforded to other

persons to whom an express assurance of confidentiality has been made to include other law enforcement agencies. However, the government does not assert that a person other than an undercover operative or another police agency provided the exempted information with an assurance of confidentiality, and the police reports obtained during trial clearly demonstrate that only an individual who was involved in the venture could have provided the government with the information utilized in its investigation.

The ranch was under intense surveillance from January 14-16, 1983(the venture took place between January 14-15, 1983) with this surveillance including extensive searches, the issuance of subpoenas and the making of detailed records and diagrams. On January 17, 1983 tire impressions were photographed and measured on the ranch airstrip and

the northern part of the ranch was searched for a "stash". On January 21, 1983 the F.B.I. knew the location and markings on the specific 55 gallon drums used to fuel the airplane and requested that they along with the brown van be processed for fingerprints and that gasoline samples be taken from the drums. (Pet. 20-21, 27-28.) According to the trial testimony Hoback did not provide information to the F.B.I. until May of 1983.(Pet. 24.) Furthermore, Hoback was not present on the ranch at the time of the venture (Pet.20-21), and was not informed of the date of the venture or specific details of the venture. (Pet. 29) Only Griffith who directed the venture, provided the ranch and gasoline, invested $10,000.00 in the venture and was not a co-defendant could have provided the information utilized in the investigation. (Pet. 6-14, 19,21,37.)

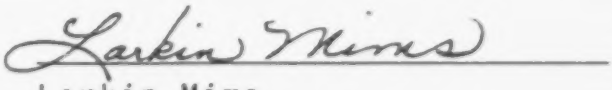
It is utterly absurd and impossible to believe that the police agencies obtained such specific information from a disinterested and uninvolved person who had been given an assurance of confidentiality or from other police agencies unless those police agencies themselves had obtained the information from an informer.[1]

---

[1] Since the petition in this matter was filed petitioner has received additional information requested in June of 1985 pursuant to the Freedom of Information Act which is from the files of the Drug Enforcement Administration and much of which is exempted pursuant to 5 U.S.C. 552(b)(7)(D) and other portions of which are exempted pursuant to 5 U.S.C. 552(b)(7)(F) which provides that investigatory records compiled for law enforcement purposes, the disclosure of which would endanger the life or physical safety of law enforcement personnel may not be made available to the public.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,



Larkin Mims,
Attorney for the Petitioner,
John Christopher Pracht